GAO
#GOC

OLL 85-0687
28 February 1985

MEMORANDUM FOR THE RECORD

SUBJECT: Hearing Before the Subcommittee on Legislation and National Security, House Committee on Government Operations, on the Constitutionality of the General Accounting Office's (GAO) Bid Protest Function

1. The Subcommittee convened at 10:00 a.m. on 28 February 1985, in Room 2154 Rayburn. The following Members of the Subcommittee were present:

Jack Brooks (D., TX), Chairman
Don Fuqua (D., FL)
Frank Horton (R., NY)
David S. Monson (R., UT)

2. The Chairman opened the hearings by stating they were being held to determine the constitutionality of GAO's enforcing certain provisions of PL No. 98-369 (Competition in Contracting Act - CICA). He stated that there had been considerable opposition to these reforms from Executive Branch agencies within the Defense Department and also from some private industries. He further stated that at issue here was the separation of powers between the Legislative and Executive Branches and that the third branch is the one that should make the decision on whether a law is unconstitutional.

3. Chairman Brooks said that both the Director of the Office of Management and Budget and the Attorney General had been invited to testify, and that the Department of Justice was being uncooperative. March 7 has been set for Mr. Stockman to testify before the Subcommittee, if he is well enough to appear because of his recent illness.

4. Mr. Brooks submitted for the record a letter signed by himself, Congressman Fuqua, Senator Carl Levin of Michigan, and Senator William Cohen of Maine, all of whom support the legislation enacted, including the two provisions in the law which the Attorney General considers unconstitutional and the Executive Branch is not enforcing. The Attorney General's view is that the Act violates the separation of powers' doctrine by authorizing the Comptroller General (1) to lift the suspension of procurement action by issuing a protest decision, and (2) to award costs.

5. Mr. Bowsher, Comptroller General, was the first witness and he read his statement in its entirety (a copy of which is attached). This was followed by several questions put to him and his General Counsel, Mr. Harry R. Van Cleve, who responded they had found several areas in the Executive Branch where the intent of the law had been ignored, that it was causing some hardships in industry, but it is hard to determine how much uncertainty it is causing, and the situation is worsening. Mr. Van Cleve also commented that GAO does not as yet have sufficient data collected on bid protest cases, but they will be able to submit the information in about six weeks.

6. When asked if any court cases are coming up to test the constitutionality of the GAO's authority under the CICA, Mr. Van Cleve said a Navy contract case was filed in Los Angeles and a hearing for a preliminary injunction is set for 11 March. He also said that he could recollect no other instance where the Justice Department had rendered a decision that part of a law be declared unconstitutional.

7. Following GAO's testimony, the Constitutional Panel, comprised of three Professors of Law, jointly responded to queries on the Executive Branch taking upon itself to declare unconstitutional a law passed by the United States Congress. All were emphatic in their views that the Competition in Contract Act of 1984 is constitutional and represents the execution of Congressional power and oversight over the Executive Branch and its agencies. When asked what the Congress could do to get the law enforced, one professor said that if the law is unconstitutional there are other ways to determine it:

--test it in the Courts;
--impeach the President (which he felt most unlikely);
--withhold appropriations.

The Chairman grasped on to the last suggestion by saying that he has long been a member of the House Judiciary and that next week that Committee will deal with the Justice Department's appropriations--he is looking forward to that meeting.

A copy of the three statements submitted by the professors is also attached. None of them read any parts of their statements which had been submitted prior to the Hearing.

STAT

Liaison Division
Office of Legislative Liaison

Attachments
As stated

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

Hearing on the Constitutionality of the
GAO's Bid Protest Function

Thursday, February 28, 1985
10:00 a.m.
2154 Rayburn House Office Building

SCHEDULE OF WITNESSES

General Accounting Office
The Honorable Charles A. Bowsher
Comptroller General
Accompanied by: Mr. Milton J. Socolar
Special Assistant to the Comptroller General

Mr. Harry R. Van Cleve
General Counsel

Constitutional Law Panel
Professor Mark Tushnet
Georgetown University Law Center

Professor Sanford Levinson
University of Texas Law School

Professor Eugene Gressman
University of North Carolina Law School

American Bar Association
The Honorable Karen Hastie Williams
Chairman, Legislative Liaison Committee
Section of Public Contract Law
(Partner, Crowell & Moring)
Appearing with: Mr. George M. Coburn
Of Counsel, Sachs, Greenebaum & Tayler

National Tooling & Machining Association
Mr. William E. Hardman
President and Chief Operating Officer
Accompanied by: Mr. Bruce N. Hahn
Chairman-Elect, Small Business Legislative Council

Mr. Paul J. Seidman
Procurement Counsel

Computer and Communications Industry Association
Mr. A. G. W. Biddle
President
Accompanied by: Mr. David S. Cohen
Senior Partner, Cohen & White

Mr. P. David Pappert
President, ViON Corporation

Washington Post, Friday, 1 March 1985
(Page A-17)

The Federal Triangle

CHARLES A. BOWSHER
... sees violation of Constitution

GAO Chief Assails Reagan's Stance On Bid Protests

Comptroller General Charles A. Bowsher yesterday accused President Reagan of violating the Constitution by defying a federal law designed to strengthen the General Accounting Office's role in handling bid protests.

The 1984 Competition in Contracting Act gave the GAO authority to hold up a federal contract if a valid bid protest was on file with government auditors. The Reagan administration views that provision as unconstitutional, and last year the Justice Department and the Office of Management and Budget ordered agencies to ignore it.

Yesterday, in testimony before the House Government Operations subcommittee on legislation and national security, Bowsher weighed into the simmering controversy by contending that "it is the president who has violated the separation of powers doctrine by defying a duly-passed act of the Congress through the actions of the attorney general and the director of OMB."

The administration has argued that the comptroller general, who heads the GAO under a fixed 15-year term, is a representative of the legislative branch and thus cannot hold up contracts awarded by the executive branch. Bowsher argued that he is an officer of the United States, appointed by the president and confirmed by the Senate, and not subject to the "whims" of congressional influence.

"Disobedience of the law is itself a matter of serious constitutional significance," Bowsher testified. "We cannot find any justification for the action taken to deliberately avoid the law in this case."

Bowsher's position was supported at the hearing by several constitutional law authorities, including a representative of the American Bar Association.

Eugene Gressman, a University of North Carolina law professor, said that the administration's action "constitutes a willful disobedience of the will of Congress. In our constitutional system of government, such a refusal by the executive to 'take care that the laws be faithfully executed' cannot and must not be tolerated."

The subcommittee has scheduled a second hearing next week to hear testimony from OMB Director David A. Stockman and Attorney Gen-

UNITED STATES GENERAL ACCOUNTING OFFICE

FOR RELEASE ON DELIVERY
EXPECTED AT 10:00 A.M. EST
THURSDAY, FEBRUARY 28, 1985

STATEMENT OF

CHARLES A. BOWSHER

COMPTROLLER GENERAL OF THE UNITED STATES

BEFORE THE

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee:

We are pleased to appear here today to discuss the position of the President and the Department of Justice that two provisions of the Competition in Contracting Act, Pub. L. No. 98-369, are unconstitutional, and the action of the Executive Branch in not executing the two provisions.

The challenged provisions are included within the "procurement protest system" established by section 2741 of the Act. Both represent additions to the bid protest procedures formerly conducted by the General Accounting Office, and are designed to make bid protests a more effective mechanism for enhancing competition. The first requires agencies in many cases to suspend or "stay" a

protested procurement action until the Comptroller General issues a decision on the protest. The second authorizes us to award attorneys fees, as well as bid and proposal preparation costs.

We strongly disagree with the opinion of the Attorney General that these provisions of the Act are unconstitutional. The Attorney General's view is that the Act violates the separation of powers doctrine by authorizing the Comptroller General both to lift the suspension of procurement action by issuing a protest decision, and also to award costs. According to the Attorney General, the Comptroller General is solely an agent of the Congress and can, therefore, only perform those functions that the Congress may delegate to its committees. The Attorney General's opinion is premised upon an erroneous understanding of the nature of the Office of the Comptroller General and the authority which he may exercise. The Attorney General's opinion is also based upon a misunderstanding of the operation of the protest system established by the Act, and its effect upon Executive Branch operations.

We also believe that, in this case, it is the President who has violated the separation of powers doctrine by defying a duly passed Act of the Congress through the actions of the Attorney General and the Director of OMB.

I. Background

Before addressing the Attorney General's view in more detail, I think it would be useful to indicate briefly why the disputed provisions were passed. An interested party may protest a violation of a procurement statute or regulation to the Comptroller General. Section 2741 of the Competition in Contracting Act codifies and strengthens the bid protest system which has been operated by the General Accounting Office for over 60 years, ever since GAO was established.

In order to insure prompt resolution of protests, the Act provides deadlines designed to achieve a decision within 90 working days.

Also, the Act requires agencies to suspend protested procurement actions pending the Comptroller General's decision, except when an agency determines that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting.

Finally, in order to provide some meaningful relief to protesters in cases where remedial procurement action is not practical, GAO has awarded bid and proposal preparation costs in appropriate cases. The Act expands this relief by providing that the Comptroller General may award to successful protesters their costs of pursuing a protest as well as the traditionally-awarded bid and proposal costs.

The Act carefully balances competing public interests. Prospective contractors have an inexpensive and expeditious forum in which their claims of illegal exclusion from the government's business may be heard. The existence of a forum for such claims, made much more effective by the stay of contract performance in many cases, will, as the Congress intended, help insure that agencies comply with the mandate of full and open competition. At the same time, provision is made to eliminate interruptions in meeting the federal government's pressing needs for goods and services in appropriate cases.

II. Opinion of the Attorney General

Let me now turn to the objections of the Attorney General.

On November 21 the Attorney General informed the Congress of his decision that federal agencies should not execute two provisions of the new protest system. The Attorney General argues that the Comptroller General is solely an agent of the Congress, and, that as such, he may only perform the functions which the Congress may delegate to a committee. In support of his contention, the Attorney General points to two Reorganization Acts which describe the Comptroller General as being "a part of the legislative branch," and to the Accounting and Auditing Act of 1950 which describes the Comptroller General as "an agent of the Congress." The Attorney General also points to statutory limitations on the President's power to remove the Comptroller General as being significant.

In the Attorney General's view, the Comptroller General may not take any action which binds individuals and institutions outside of the Legislative Branch. To do so would be to perform an "executive" function. This includes the Comptroller General's statutory authority to lift the "stay" of procurement actions by issuing a protest decision, which the Attorney General characterizes as "the power to dictate when a procurement may proceed." It also includes the award of the costs of pursuing a protest and bid and proposal preparation costs.

III. Nature of the Office

I am firmly of the view that the Comptroller General of the United States is not solely an agent of the Congress, but rather serves as an officer of the United States. As such, the Comptroller General may exercise the authority given him under the Competition in Contracting Act wholly consistently with the Constitution.

Since creation of the Office of the Comptroller General in 1921, Comptrollers General have performed a variety of duties to serve the needs of the Congress. Such activities include our traditional audit reports, staff papers and studies, our responses to requests for views on proposed legislation, and legal opinions on matters which do not involve our account settlement responsibilities.

Other responsibilities affect directly the Executive Branch agencies and provide assurance that funds are fully and accurately accounted for and expended in a manner authorized by law. One example is the Comptroller General's responsibility to audit and settle accounts. Another is the settlement and adjustment of claims by and against the United States. And still another is the issuance ~~promulgation~~ of government-wide accounting and internal control standards.

However these various functions may be classified, one aspect of the Office of the Comptroller General is clear. The Comptroller General by statute is, in fact, appointed in the manner provided in the Constitution for appointment of "Officers of the United States." It is true that once appointed by the President after Senate confirmation he does not serve at the pleasure of the President but, rather, serves for a fixed term of 15 years.

The Attorney General argues that the security of the Comptroller General from removal by the President necessarily renders him a part of the legislature. Yet there are other officers of the United States for whom Presidential removal is significantly circumscribed without affecting their status. And the fact is that the Comptroller General cannot be removed at the whim of the Congress either. The Congress can remove the Comptroller General by joint resolution (which requires a majority vote of both chambers and the signature of the President), but

only after notice and hearing, and only for one or more of five specified reasons: permanent disability, inefficiency, neglect of duty, malfeasance, or conduct which is felonious or involves moral turpitude. Congress can also remove the Comptroller General by impeachment, as it can remove any officer, but again only through lengthy procedures designed to ensure due process and fairness and only for certain limited reasons: treason, bribery or "High Crimes and Misdemeanors."

In short, the provisions governing removal of the Comptroller General support, rather than contradict, his status as an officer of the United States. This status of the Comptroller General is in no way affected by references in the 1945 and 1949 Reorganization Acts to the General Accounting Office as "a part of the legislative branch of the Government." By characterizing the Comptroller General, the head of the GAO, as part of the Legislative Branch, the Congress did nothing more than restrict the ability of the President to place him in a subservient status through the device of a reorganization plan. In 1932, President Hoover had proposed a transfer of GAO to the Bureau of the Budget. Thereafter, GAO was excluded from Presidential reorganization authority, including the 1945 and 1949 Reorganization Acts. The Attorney General errs in attributing constitutional significance to statutory classifications of the Comptroller General.

IV. The Comptroller General and the Separation of Powers

The Comptroller General's entire duty under the Competition in Contracting Act is limited to three basic actions: the ~~promulgation~~ issuance of procedural rules, the issuance of recommendations pursuant to specific findings, and the award of costs based upon specified legal determinations. There is no doubt that these are precisely the type of duties that the Comptroller General has exercised since 1921. Under the Act, the Comptroller General is required to give advisory opinions regarding the legality of procurement actions, which will presumably bind him in the audit and settlement of accounts, just as he has always done under his account settlement authority. He is empowered to award bid and proposal preparation costs and the costs of pursuing protests, just as he traditionally granted bid and proposal costs under his claims settlement authority.

The Attorney General argues that the authority to award costs and the "stay" provisions of the Act involve the exercise of executive powers which can only be exercised by an officer under direct control of the President. Certainly, there are officials whose purely executive jobs are so related to the President's constitutional duties that operation of our form of government requires the official to be directly responsible to the President. However, the award of costs to protesters

cannot reasonably be viewed as requiring the President to have direct control over the official who performs the function. The authority to award costs based upon a determination that a procurement action violated a statute is not assigned by the Constitution to the President, and exercise of that authority by an officer of the United States cannot reasonably be said to interfere with the President's performance of his constitutional duties.

Similarly, the "stay" provisions do not place purely executive powers in the hands of the Comptroller General. The Act merely requires the procuring agency, if it can do so consistently with the national interest, to "wait and see" what the Comptroller General recommends before proceeding. The agency is not required to wait at all if it determines that performance would be in the best interest of the United States or that delay would "significantly affect interests of the United States." The "stay" provisions can hardly be said to involve one branch assuming the power to control another branch. Moreover, the "stay" provision cannot "disrupt the proper balance between coordinate branches" or "coerce" the constitutional office of the President by delaying previously authorized executive action, since the "stay" is only implemented if the Executive Branch itself finds delay consistent with the interests of the United States.

V. Constitutionality of Executive Branch Actions

Finally, we believe that the President, not the Congress, has violated the separation of powers doctrine. Upon signing the Act, the President stated that he was instructing the Attorney General to inform executive agencies how to comply with the Act consistently with the Constitution. As I have discussed, pursuant to this instruction the Attorney General directed agencies not to comply with two provisions of the Act. The Director of OMB, in turn, issued a bulletin specifically providing the same direction to all executive agencies.

Disobediance of a law is itself a matter of serious constitutional significance. The President's constitutional duty is to "take care that the laws be faithfully executed." We cannot find any justification for the action taken to deliberately avoid the law in this case.

The Competition in Contracting Act imposes few limitations upon executive action in a field long-recognized to be a proper concern of the Congress, contracting by the federal government. The disputed "stay" provision can be avoided by executive agencies when required by the pressing needs of the United States, and the payment of compensation or damages to private claimants cannot reasonably be claimed to have major constitutional significance.

The Comptroller General has exercised statutory duties similar to those provided in the Act since 1921, and the Attorney General cannot point to one judicial decision holding that those duties violate the separation of powers doctrine. In fact, the absence of decided case law supporting the Attorney General's constitutional opinion is a strong argument that, in this case, the Constitution requires the President to uphold the law.

It is significant that the actions of the Attorney General and the Director of OMB, which constitute lawmaking by the Executive Branch, were unwarranted based upon the Attorney General's legal opinion. The Attorney General recognized in his opinion the power of the Congress to enact a law providing for suspension of a procurement for 90 days following a protest. He was only concerned about the Comptroller General's authority to release a suspended procurement by issuing a decision, and the authority to delay a procurement for more than 90 days following a protest. In order for agencies to comply with the law in a manner consistent with the Attorney's General's opinion, they need only have been directed not to proceed with a protested procurement action for 90 days even if the Comptroller General issues an earlier decision,and to end a stay after 90 days if a decision or satisfactory justification for delay has not been issued by the

Comptroller General. Instead, OMB eliminated a provision of the Competition in Contracting Act that is central to enhancing the ability of the bid protest system to increase full and open competition for contracts. We do not believe that the Constitution empowers the President and his subordinate officers to undertake this revision of the Competition in Contracting Act.

Before the
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 28, 1985

STATEMENT OF EUGENE GRESSMAN*

on

Executive Refusal to Execute Certain Provisions
of the Competition in Contracting Act of 1984

On December 17, 1984, the Director of the OMB, acting on the advice of the Attorney General of the United States, issued a directive to all heads of Executive Departments and Agencies to disregard certain bid protest provisions of the Competition in Contracting Act of 1984. That directive was premised on the Attorney General's conclusion that two provisions of that Act "are unconstitutional because they purport to authorize the Comptroller General to exercise Executive authority in violation of the principle of Separation of Powers."

In my judgment, this directive constitutes a willful disobedience of the will of Congress, as expressed in the two bid protest provisions of this Act. In our constitutional system of government, such a refusal by the Executive to "take care that the Laws be faithfully executed" cannot and must not be tolerated. The bases for my judgment in this respect may be summarized as follows:

(1) Whatever the merits of the Executive's constitutional doubts about the statutory provisions in question, the central fact is that the Constitution nowhere excuses the President from fulfilling his vested obligation (Art. II, Sec. 3) to "take care that the Laws be faithfully executed" because of any sincere doubts he may have as to the validity

---

* William Rand Kenan Professor of Constitutional Law, School of Law, University of North Carolina, Chapel Hill, N. C. 27514. Also Special Counsel to the U. S. House of Representatives since 1976 in the "one-House veto" litigation, including I.N.S. v. Chadha, 462 U.S. 919 (1983).

of the laws that are his to execute. "It is a startling notion," Raoul Berger has written, that a President "may refuse to execute a law on the ground that it is unconstitutional. To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic." R. Berger, Executive Privilege: A Constitutional Myth 306 (1974).

(2) Put differently, once a bill has passed through all the constitutional forms of enactment and become a law, perhaps even over a presidential veto grounded on constitutional objections, the President has no option under Article II but to enforce the measure faithfully. The Constitution simply does not give the President "the power to defeat the will of the people or of the legislature as embodied in law." 3 W. Willoughby, The Constitutional Law of the United States 1503 (2d ed. 1929). Or, as Professor Corwin has written, "once a statute has been duly enacted, whether over his protest or with his approval, he [the President] must promote its enforcement." E. Corwin, The President: Office and Powers 79 (3d ed. 1948).

(3) The President's Article II duty of executing laws, as Justice Holmes once wrote, "is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." Myers v. United States, 272 U.S. 52, 177 (1926)(Holmes, J., dissenting). In other words, if the execution of a law is to be faithful, it must be faithful to precisely what Congress has written into the law, no more and no less. But once the Executive oversteps the bounds of faithfulness, either by adding to or subtracting from what Congress has provided, then the separation of powers equilibrium established by our constitutional system tilts dangerously toward the Executive Branch.

(4) The Supreme Court's ruling in Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), teaches that when the President tries to do more than what a statute permits him to do, the President becomes a lawmaker, a status foreign to the constitutional division of power. Certainly, as the Court there said, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 587. Rather, the Constitution places the lawmaking function exclusively in the hands of Congress, i.e., the function to "make laws which the President is to execute." Id. Thus the power of execution does not include the power of affirmatively adding to what the legislative body has provided.

(5) By the same token, the Executive's power of execution does not include a power to ignore or disobey what Congress has provided. To permit the President to disobey or to refuse to execute a portion of a statute is to engage in negative Executive lawmaking, as happened in the impoundment crisis of a decade ago. Such refusal to execute, be it due to constitutional doubts about the statute or otherwise, amounts to a partial repeal of the statute -- a repeal that can constitutionally be effected only through the normal legislative processes. The principles enunciated in Youngstown Co. v. Sawyer would seem to bar such negative lawmaking by the Executive. That proposition would seem to be at the heart of Justice Rehnquist's statement, written in 1969 as an Assistant Attorney General commenting on the President's impoundment authority:

> It is in our view extremely difficult to formulate constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.

(6) The ultimate irony here is that the Executive's protest that Congress has sought to authorize the Comptroller General to exercise Executive authority is raised by means of an Executive invasion of the legislative powers of Congress -- by effecting a "non-execution" repeal of the challenged provisions of the Competition in Contracting Act. The Executive is attempting to read Article II "as giving the President not only the power to execute the laws but to make [and unmake] some." Youngstown Co. v. Sawyer, 343 U.S. at 633 (Douglas, J., concurring). And the Executive is seeking to use Article II not only as a vehicle for executing legislative powers but as a mechanism for testing the constitutionality of the statutory provisions. There are certainly better methods of securing judicial review of those provisions than by an Executive violation of the separation of powers doctrine and by an Executive refusal to "take care that the [Competition in Contracting Act] be faithfully executed."

(7) Finally, the foregoing sentiments do not imply that the President is without power to make his own assessment of the constitutionality of statutes, either before or after final enactment. And we have witnessed situations, such as the "one-House veto" litigation, where the Executive has simply refused to defend the constitutionality of a statute when judicial review has been properly instituted. But that is a far cry from saying that the Executive may express his constitutional displeasure with a duly enacted statute by ignoring or refusing to execute it in the first instance. Such inaction by the Executive strikes at the very fabric of the separation of powers doctrine. Congress should take prompt action to repair the jagged tear in that fabric created by the OMB's directive of December 17, 1984.

STATEMENT BEFORE THE GOVERNMENT OPERATIONS COMMITTEE OF THE UNITED STATES HOUSE OF REPRESENTATIVES ON FEBRUARY 28, 1984 BY SANFORD LEVINSON, PROFESSOR OF LAW, UNIVERSITY OF TEXAS LAW SCHOOL

Mr. Chairman, my name is Sanford Levinson, and I teach constitutional law at the University of Texas Law School in Austin, Texas. I am also the co-editor, with Professor Paul Brest of the Stanford Law School, of a casebook on constitutional law, Processes of Constitutional Decisionmaking. I very much appreciate this opportunity to testify today on a topic that is one of the central concerns of our book and that I consider perhaps the most most important single riddle of American constitutional theory--the duty of non-judicial public officials to engage in independent constitutional analysis.

Today's hearing, of course, arises from the refusal of the Reagan Administration to enforce certain provisions of the Competition in Contracting Act of 1984 contained in the Deficit Reduction Act of 1984. The rationale given for the refusal to obey the Act is its putative invalidity under the constitutional command that the three great branches of government remain separate. I shall first discuss the arguments concerning these provisions and then go on to the issue of even greater importance, which is the Executive's duty in regard to statutes, passed by Congress and signed by the President, that the Executive branch nonetheless considers to be unconstitutional.

I. The Constitutionality of the Deficit Reduction Act of 1984

I will not rehearse the specific provisions of the Act, since they are well known to this committee. Suffice it so say that the Department of Justice has consistently argued that the the Constitution prohibits participation by the Comptroller General in the process of deciding on the validity of protests regarding the award of federal contracts. In particular, the Department emphasizes the role of the Comptroller General as a "legislative" official, indeed "an arm of the legislature," M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1305 (D.C. Cit. 1971), quoted in Delta Data Systems Corp. v. Webster, 744 F.2d 197, 201 ft. 1 (D.C. Cir. 1984). Although the Comptroller General is appointed by the President, with the advice and consent of the Senate, and is therefore clearly an "Officer of the United States," Buckley v. Valeo, 424 U.S. 1, 128 ft. 165 (1976), he is removable by joint resolution of the Congress, among other procedures. According to the Department, therefore, this basic accountability to the Congress disables the Comptroller General from engaging in essentially executive duties. Principal reliance is placed on the most recent cases of the United States Supreme Court that have considered the basic theory of separation of powers, Buckley v. Valeo, supra, and INS v. Chadha, 103 S.Ct. 2764 (1983).

Constitutional law is something of a minefield, especially these days, and only the foolhardy would speak overconfidently about what the Constitution does and does not tolerate. Of no area is this more true than separation of powers, a term which does not appear as such in the Constitution but which

nevertheless has informed our basic sense of governmental structures since 1787. That caveat being stated, I must nevertheless also state that I have little problem in viewing the specific provisions as perfectly acceptable under the Constitution.

Buckley v. Valeo is, I think, irrelevant to the present controversy, since that case dealt clearly with the ability of the Congress to appoint officials directly to the Federal Election Commission. The Court unanimously held that such a procedure violated the Appointments Clause of the Constitution, which requires that appointments of officers of the United States be made by the President, heads of departments, or courts of law. Here, on the contrary, the appointment of the Comptroller General meets the specific terms of the Clause. The fact that the Congress can, in theory, remove the Comptroller General by joint resolution is, I believe, not sufficient to change the analysis. One must begin realistically by noting that no Comptroller General has been so removed, and it boggles the mind to suggest that such a momentous step might be taken because of Congressional displeasure with a decision of the Comptroller General in regard to the awarding of a federal contract. It may be true that the Comptroller General is, in some sense, ultimately more "accountable" to the Congress than to the President, but this does not, I believe, so distort the relationship between the two branches that the Constitution must intervene to stifle the procedures called for by the Act.

The essential problem raised by almost all of the modern separation of powers cases, of course, is what has come to be called the modern administrative case. Indeed, for almost a half-century now, we have become used to references to a "fourth branch of government," the bureaucracy and administrative agencies, that have radically transformed an earlier understanding of a more simple tripartite structure of government.

It is obvious to any observer that these agencies are quasi-legislative insofar as they make specific regulations often based on extremely general commands of Congress to act in the "public interest"; they are executive insofar as they enforce their regulations; and they are quasi-judicial as well insofar as they have increasingly elaborate systems of administrative courts to adjudicate controversies generated by the administrative scheme. I have significant difficulty differentiating the Comptroller General from any of the other administrative agencies, at least at the constitutional level.

The Attorney General relies importantly on the Chadha case, which invalidated the so-called "legislative veto" by which one House of Congress could affect the legal rights of government officials or private persons outside of the Legislative branch by invalidating a decision of an executive or administrative official. The Supreme Court, by a 7-2 vote, considered this to be "lawmaking," and it went on to say that "[i]t is beyond doubt that lawmaking was a power to be shared by both Houses

and the President," 103 S.Ct., at 2782, and not to be delegated to a single House of the Congress.

I confess that I have immense difficulties viewing the actual decisions envisioned by the Comptroller General as "lawmaking," unless one says that every review of a federal contract results in equal "lawmaking." That is, I presume that no serious constitutional argument could be directed at a congressional decision to establish a new administrative agency that would review all federal contracts and do precisely what the Comptroller General is asked to do under the Deficit Reduction Act. The one and only concern is whether or not the Comptroller General, different in certain ways from the typical administrative agency, can engage in such otherwise uncontroversial activity.

Presumably this is the point raised by the Department of Justice in its citation of the 1928 case Soringer v. The Philippine Islands, 277 U.S. 189, and its definition of "legislative power" as "the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement." (The latter part of the clause, dealing with appointment, is inapplicable because it is, of course, the President who appoints the Comptroller General.) The Department rightly argues that the Comptroller General is charged with certain enforcement tasks under the Contracting in Competition Act. But I do not believe that the Comptroller General, however much in some ways part of the legislative branch, is so implicated with the legislature as to call into being the invalidity of an act of Congress.

I believe that this concern expressed about legislative enforcement of its own laws requires a deeper elaboration of the Chadha case beyond rather simplistic notions of separated powers. Why, that is, ought one be concerned about the legislative veto? Why ought one not be concerned about the role played by the Comptroller General?

Chadha dealt with the direct intervention by Congress into decisionmaking by the executive branch. Chief Justice Burger, writing for the majority, emphasized that the historic roots of separating the legislature from the enforcement of the law lay in a concern about the potential for political corruption. A fear that "special interests could be favored at the expense of public needs" requires that enforcement be protected from the "strong passions and excitements" that sometimes characterize the legislature, at 2783. Less ominously, one might simply say that the process of law enforcement and administrative rulemaking should, as much as possible, be distanced from the concerns of persons concerned about their imminent campaigns for re-election. Law enforcement, which should transcend partisan political considerations, should indeed be removed from the legislature. I think it is hard not to be sympathetic with such concerns and to wish to read them into the Constitution as a protection against tyranny. This scarcely requires, however, that one accept the Justice Department's view in the instant case.

I should admit, incidentally, that I am unpersuaded by the sweep of Chief Justice Burger's opinion; instead, I believe

that Justice White stated a much more generally defensible view, even though, in the specifics of Chadha, I have considerable sympathy for Justice Powell's focused and precise invalidation of the specific legislative act under consideration. Still, I don't think that one must reject the majority opinion in order to find the Competition in Contracting Act of 1984 constitutional.

The Department of Justice takes special note of the fact that a panel of the Court of Appeals for the District of Columbia recently cited Chadha for the proposition that "there might be a constitutional impediment" to giving binding effect to determinations of the General Accounting Office. Delta Data Systems, supra, at 201 ft. 1. The Court, however, did not cite any specific aspect of Chadha, and, with all due respect, I think that the present circumstances are easily distinguishable.

The direct intervention by Congress that was so patent in Chadha--and is the central concern of those who emphasize the separation of legislative from executive power--is totally absent under the procedures set out by the Act. The Comptroller General of the United States and the General Accounting Office are scarcely handmaidens of specific legislators. An appointee of the President, the Comptroller General has in fact much more independence than the typical member of a federal agency, whose term of office expires far short of 15 years and who may constantly be worried about being reappointed by a President. Indeed, I am not aware that any federal officials beyond judges, with their lifetime

appointments, have such secure tenure as the Comptroller General. I believe that this single fact exemplifies the weakness of the position taken by the Department of Justice and would lead a court to a far different conclusion than that reached in Chadha.

Indeed, the real problem with extending Chadha's holding in the way required by the Department's analysis is that it would call into account the constitutional validity of the entire administrative State as we know it. This, of course, was the central concern expressed by Justice White in his lengthy dissent. A simplistic view of the government as consisting of three branches just does not come to terms with the fourth branch and its mixture of functions. Because of the sweep of some of Chief Justice's language, one cannot dismiss the Department's view as "frivolous," but I find it almost impossible to believe that a majority of the United States Supreme Court would embrace a view that would require judicial intervention and "imperialism" of dazzling proportions.

II. The Duty of the President to Enforce a Statute Passed by the Congress (and Signed by the President)

Does the President of the United States have the duty to engage in independent constitutional analysis while conducting his office? Stated this way, the answer is clearly yes. The President takes an oath of office pledging that he will "preserve, protect and defend the Constitution of the United States." Just as John Marshall derived from his oath of office

the principle that a court need not enforce a congressional statute deemed to violate the Constitution, so can the President easily argue that he too is prevented from enforcing an unconstitutional statute. Indeed, it would be paradoxical to argue that the President does have the duty to enforce an unconstitutional statute. The question, however, is not that simple. Instead, I think that we must ask first what procedures the President is required to go through when making such a determination and secondly if there are specific categories of laws where we might be more or less willing to trust Presidents to engage in such analysis.

As this very controversy illustrates so well, the President is not the first person to consider the constitutionality of the Competition in Contracting Act. This Congress has also considered the question, and therefore the correct way of beginning our analysis is to ask how the President must structure his response to the Congress.

The Constitution itself provides one clear answer: The President can veto legislation he believes to be unconstitutional. Even here, I might point out, there is some question as to the freedom a President ought to give himself to challenge a congressional judgment. The first elaboration of the issue came up during the consideration in 1791 by George Washington of the bill establishing the First Bank of the United States. Thomas Jefferson, the Secretary of State, wrote an opinion attacking its constitutionality. That opinion

included a remarkably interesting paragraph, however, that provides room for thought even today:

> It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hand so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for the cases where they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President. (Quoted in Brest and Levinson, pp. 14-15.)

As I read this, it suggests that the President should defer to congressional judgment unless he is clearly convinced that the Congress made a mistake. On the one hand, after all, we have the judgment of a majority of what are now a total of 535 legislators, who also take oathes to support, protect, and defend the Constitution; on the other is a single individual who, whatever his personal good faith, is trying to set aside the congressional judgment.

If Jefferson was willing to argue that a President should be cautious even in <u>vetoing</u> a bill on constitutional grounds, in spite of the clear allocation of such a power by the Constitution, how much more would he wish the President to be absolutely certain of his position before disdaining to enforce a statute that was <u>not</u> vetoed. A rough analogy can be drawn to some standard approaches toward the problem of judicial review.

Going back to John Marshall, the strongest arguments for the judicial invalidation of congressional statutes occur in

contexts where the meaning of the Constitution appears absolutely clear. In Marbury v. Madison itself, Marshall, falsely in my opinion, argued that Article III could be interpreted only one way. Where genuine debate over the meaning of the Constitution is possible, however, he seems to suggest that the courts should accept the congressional resolution.

Modern constitutional theorists, who are generally inclined to find more ambiguity throughout the Constitution than did Marshall, are likely to argue that judicial invalidation should occur only when there is reason to believe that Congress has acted in an especially unfair way. Emphasis is placed by such theorists, as well as many of the decided cases of the Supreme Court, on such acts as closing the political process itself to those with dissenting views or passing legislation that discriminates against historically disfavored minorities. Otherwise, the principles both of majority rule and respect for the almost inevitable ambiguities revealed by close textual analysis dictate deference to the congressional judgment.

The principles that counsel a certain caution by courts before striking down legislative enactments might well work as well to provide at least some kind of barrier to precipitate presidential action, especially in the absence of the use of the veto power granted the President under the Constitution. Indeed, what President Reagan is trying to do here is establish a de-facto post-hoc line item veto, albeit one that is constitutionally based.

I confess that I have considerable sympathy for the position that the President might be authorized under the Constitution to veto specific sections of a statute on the grounds that they are unconstitutional, as opposed merely to his finding them unwise policy. But, of course, President Reagan did not exercise his constitutional authority to veto legislation and thus give Congress a chance to override. Instead, he is seeking to establish a far more extensive power, one which one give him the ability to sign legislation and then, without giving the Congress an opportunity to override his views, simply refuse to enforce the legislation that he himself had signed.

From my perspective, it would have been far better had the President asserted a line item veto authority, constitutionally based, than to assert a far more widereaching authority that denigrates Congress' essential role in the constitutional structure. To be sure, an assertion of the type I am suggesting would be unprecedented, but it would be scarcely less so than the one actually being made. It would also be far more in keeping with the spirit of our institutions that the unilateral decisionmaking revealed here.

It is only fair to point out, though, that even the adoption of a veto practice described above would not speak to the problem of a President who genuinely believes that a measure signed by a predecessor was unconstitutional. It is hard to argue that one President ought to be able to bind another on matters of constitutional analysis any more than one

group of Supreme Court justices can genuinely bind a successor group.

Still, it is necessary to recognize that we do not have as an operative constitutional practice the line item veto of the type I am describing. Returning to the reality of modern politics, we must take into account the full complexities of modern legislation and the factors that make the present veto practice inadequate as a full protection against putatively unconstitutional legislation.

A reality of modern legislative practice is that, as with the Deficit Reduction Act, legislation is often "omnibus," containing many different acts presented on an all-or-nothing basis to a President. As with the most famous example, where Congress during World War II attached to a defense appropriations bill a rider having the effect of firing three federal employees suspected of being subversives, a President might have to sign a bill because non-signature would generate a disaster. What is a President supposed to do then? Is his only course to enforce a statute that is viewed as unconstitutional?

One good answer, of course, is yes, especially if enforcement of the statute in no serious sense involves issues of personal liberty or other important individual rights. I shall return to this point below, but let me assume for the moment that the President should be vigorous in defending his view of the Constitution in all of its areas, including separation of powers. Still, the procedure by which such review takes place is vital.

If there is one thing we can be sure of, it is that Ronald Reagan has not personally studied the relevant legal materials in order to make an independent determination of the meaning of his oath. We are obviously talking, that is, of the institutionalized Presidency rather than decisionmaking by a specific President. What kind of institutionalization should we require in order to tolerate, even in theory, presidential repudiation of statutory commands?

Let me begin my answer with a negative: We should not tolerate a process whereby a politically appointed assistant attorney general writes a memorandum that is designed to accord with an already adopted position of the President. If the executive branch is to take on some of the attributes of a court, a development which I would applaud in many ways, it should seek out the most disinterested member of the Department of Justice and demand of that official precisely the same behavior that is required of a judge. To be specific, I would suggest that presidential interposition should even be thinkable if and only if the Solicitor General of the United States delivers a published opinion stating that in his or her opinion the congressional act under question violates the Constitution of the United States. I want to emphasize that this is a different test from one simply requiring that the Solicitor General find that a "good faith" argument supports the President's position or that he or she would be willing to defend the President's position in court.

The point, of course, is that the presidential activity is designed to preclude judicial review, or at least to make judicial review dependent on the fortuity of a claimant under the Act having standing to be able to trigger judicial review. If the Executive adopts such a posture, then we must require as a minimum an internal procedure within that branch that pays due heed to the values embraced within the Oath of Office.

At present the Solicitor General does not prepare official opinions; that is the formal job for the Attorney General, though they are actually prepared by the Office of Legal Counsel within the Justice Department. This, however, is a development within the past thirty years. Before 1951, the Solicitor General indeed was responsible for preparing opinions, and I strongly encourage this Committee to consider reviving this role.

It does no discredit to the incumbent Attorney General to note that the Solicitor General is almost always an unusually distinguished lawyer, often with previous judicial or academic experience. The Solicitor General is, of course, a presidential appointee and is therefore accountable to the President, but the office has an established tradition of at least quasi-independence. One might well view the deliberations of the Solicitor General as relatively disinterested in a way that would be absent in regard to the rest of the Department of Justice.

By no means would a "ruling" of the Solicitor General be dispositive. Judicial review might well be possible, assuming

proper standing, and the Solicitor General would have the opportunity of presenting the argument to a court, but in the interim we would at least be assured the highest level of constitutional analysis that could be expected. One can have little confidence that such a level has been manifested in this instance.

I want to conclude by returning to the second point mentioned earlier: Are we more willing to trust the President in certain areas of the law instead of others? My tentative answer is yes. That is, a President who refused to enforce certain statutes on the grounds that they are significant deprivations of individual liberties or fundamental public values would be entitled to a measure of respect, especially if the decisionmaking process prior to non-enforcement were the one described above. I can easily imagine admiring a President who refuses to indict individuals under a statute thought to be unconstitutional, since an indictment can often be disastrous to the individual involved. But here no issue of personal liberty is present.

The issue that <u>is</u> presented--separation of powers--is one where we might be least willing to trust independent presidential decisionmaking, since there is no reason at all to view the President as a genuinely disinterested party. He is engaged in turf protection, not in the protection of fundamental liberties. Of course, one might view Congress also as an interested party and be disinclined to accept their view as the last word. If one believes that the Constitution

genuinely speaks to the issue of separation of powers, then it is perhaps especially appropriate that the judiciary play an umpiring role between the two branches, since it is the one branch that can be viewed an disinterested in this battle over turf.

In conclusion, let me congratulate this committee for bringing to public attention an issue of the highest public importance. The issue of federal contracting procedure is not one designed to provoke public passion. But the underlying issue--which was described in the 1960's as the "imperial Presidency"--is back with us in spades, and one has only to look througout the Reagan Presidency, whether in Central America or the attempts to fabricate an official secrets act out of whole cloth, to know that this is an Administration that does not fundamentally respect the constraints of office. I hope that the deliberations of this committee help to roll back the amount of turf being claimed by this Administration.

STATEMENT OF MARK TUSHNET,

PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

My name is Mark Tushnet. I am Professor of Law at the Georgetown University Law Center here in Washington. I have been teaching constitutional law for the past ten years and have written widely on constitutional law. In addition, I have co-authored a casebook on the jurisdiction of the federal courts. I would like to thank the Committee for inviting me to testify on this important issue. Because time for preparation was short, my remarks are somewhat abbreviated. I will submit a more detailed statement to the Committee shortly.

As you know, there are two aspects of the problem before us. First, are the relevant provisions of the Competition in Contracting Act constitutional? Second, if the President believes that they are unconstitutional, may he direct his subordinates simply to ignore them? I want to begin with some brief comments on the first issue, for I believe that its analysis clarifies the precise nature of the second.

The President contends that two provisions of the Act are unconstitutional. The first provision authorizes the Comptroller-General to lift an otherwise automatic stay on the contracting process if he or she finds a bid protest frivolous; the second allows the Comptroller-General to direct that contracting agencies pay attorneys' fees to successful bid protestors. These provisions are said to violate principles of

the separation of powers by vesting executive or judicial authority in an arm of the legislature.

This contention obviously turns on whether the Comptroller-General is an arm of Congress. I take it for granted that Congress could give an independent agency the powers challenged by the President. For present purposes we can imagine governmental agencies arrayed on a spectrum ranging from plainly legislative agencies such as this committee through independent agencies such as the Federal Trade Commission to obviously executive agencies such as the bureaus of the Treasury Department.

Where in this spectrum is the Comptroller-General located? In particular, how similar is the Comptroller-General to an independent agency? The relevant Supreme Court decisions, and consideration of matters of principle, indicate that we must take into account a number of considerations. One is the manner of appointment. Here the Comptroller-General resembles the head of an independent agency. Another consideration is whether independence of substantial legislative or executive direction is important to the sound functioning of the agency. In light of the auditing tasks of the General Accounting Office, this too points in the direction of independence.

However, other considerations suggest that the Comptroller-General should be regarded as an arm of Congress. The cases emphasize congressional intent in creating the agency, and Congress appears to have wanted the Comptroller-General to be its agent. Further, though Congress may limit the President's

power to remove heads of independent agencies, it is not obvious that it may do so as severely as it has done with the Comptroller-General.

In my judgment the arguments supporting the view that the Comptroller-General is not an arm of Congress, for purposes of separation of powers analysis, are somewhat stronger than those supporting the opposite view. But a contrary judgment is not ruled out by the relevant precedents or by fundamental principle.

With that as background, I would like to turn now to the second, and I believe more important, issue: What courses are open to a President who believes that enacted legislation is unconstitutional? Here I want to emphasize what dimensions of the problem my prior comments have excluded. We are not faced with a situation in which the President is refusing to enforce a patently unconstitutional statute, nor one in which the President's constitutional objections are patently frivolous. Different and less difficult issues would arise in wuch situations.

To analyze the present problem, it may help to revert to the fundamentals of the constitutional order. There is a tradition in our history defending a version of a theory that I shall call here judicial supremacy. This version of the theory of judicial supremacy begins by maintaining that the courts are the ultimate and authoritative expositors of the meaning of the Constitution. From its origins in Marbury v. Madison through its restatements in Cooper v. Aaron and United States v. Nixon, to its most recent appearance in Justice Powell's dissenting opinion last week in

the Garcia case, this version of the theory has come to include two additional propositions. First, it holds that it is improper for a legislator or the President to act on interpretations of the Constitution different from those offered by the Supreme Court. Second, it holds that, because the courts are the authoritative expositors of the Constitution, where the meaning of the Constitution is uncertain it is improper for legislators or the President to act so as to obstruct the adjudication of those controverted constitutional questions.

Thus, on this version of the theory of judicial supremacy, a member of Congress ought not vote against proposed legislation solely because he or she believes it to be unconstitutional, at least if some authority exists to support its constitutionality. Nor may a President veto legislation solely on constitutional grounds. Nor, finally, may a President refuse to enforce legislation that he or she believes to be unconstitutional. Under this version of the theory, the proper course of action is to enact, sign, and enforce the legislation and submit the constitutional questions to adjudication in the courts.

Although this version of the theory has some force in extreme cases, of which Cooper v. Aaron may be one, it has a number of flaws that, in my judgment, make it unacceptable. Before discussing them, I should note that, if one accepts this version of the theory of judicial supremacy, the President has acted improperly in the present situation. But this version of the theory seems at odds, first, with the common sense of the matter. Members of Congress and the President take the oath to

support the Constitution, and the President is required faithfully to execute the laws of the United States, which surely include the Constitution as supreme law. Those duties seem to require that they be allowed to make independent judgments on constitutional issues.

Second, the theory is inconsistent with much historic practice. Of course members of Congress may refuse to vote for proposed legislation on policy as well as on constitutional grounds; a President may veto legislation for a similar mix of reasons; and a President may direct his or her subordinates to exercise appropriate prosecutorial discretion in refusing to enforce legislation. The availability of these nonconstitutional grounds for refusing to act obscures the fundamental issue. But there are instances of refusals to act that are simply inconsistent with this version of the theory of judicial supremacy. The most celebrated is President Jackson's veto of the rechartering of the Second Bank of the United States, which he placed substantially (though not exclusively) on the ground that Congress lacked the power to create a national bank notwithstanding the Supreme Court's decision to the contrary in McCulloch v. Maryland.

Finally, and perhaps least important overall, the theory has difficulty dealing with situations in which the legislation, if enacted, is unlikely to become the subject of adjudication. Expanded notions of standing reduce the number of such situations. But recent decisions suggest that many separation of powers issues may never be adjudicated. If the problem at hand

is one of them, the theory of judicial supremacy is of no help.

The theory of judicial supremacy can be set against an alternative, which I will call a theory of competing authorities. Under the theory of competing authorities, each branch may act on its own interpretations of the Constitution. Legislators can support legislation that the courts have declared or would declare unconstitutional, or oppose legislation that the courts have declared or would declare perfectly constitutional. Similarly as to the President, who may enforce legislation in the face of judicial declarations of unconstitutionality or refuse to enforce it despite adjudications upholding the legislation. The theory of competing authorities avoids most of the flaws of the theory of judicial supremacy. It takes the constitutional oath seriously, and is consistent with much historic practice.

However, the theory of competing authorities itself has some problems. It raises the specter of anarchy, as each branch acts in a manner inconsistent with the constitutional views of the others. The theory of judicial supremacy is attractive because it offers a final resolution to controverted constitutional claims. Further, the theory of competing authorities readily degenerates into a theory of the supremacy of one or another branch. Roughly, whoever is last in line gets the authoritative say in the matter. If Congress and the President agree that a statute is constitutional, the courts may block its enforcement. If Congress believes that a statute is constitutional and the President disagrees, a veto or a simple refusal to enforce will prevent the courts from expressing their views. And if Congress

believes that a proposal is unconstitutional, it will not be presented to the President or the courts.

I believe that the theory of competing authorities remains helpful in the analysis of the problem at hand, for two sets of reasons. The first derives from the issue, mentioned above, that the last in line has the authoritative say. Whether or not this is regarded as a problem, it certainly suggests the importance of identifying who is last in line. For example, should the President be allowed to enforce a statute after the courts have declared it unconstitutional? With respect to that problem, should the courts or the President be regarded as the last in line? Surely it is desirable to have some relatively clear resolution of the question of who is last in line, so that the government may continue to function without unnecessary roughness.

In the present context, it would seem clear that the President should be regarded as last in line, in the sense that the President's signature is required before a bill becomes a law. The decision to sign or veto a bill is, for these purposes (and subject to the possibility of a veto being overridden), the last point at which the President ought to be allowed to assert a competing authority to interpret the Constitution. Otherwise the President would have two or more bites at the apple--first in deciding to sign or veto, then in deciding to comply or not comply with the statute, and then in deciding whether or not to comply with an adverse adjudication.

Giving the President two or more chances arguably enhances

the executive's power beyond an appropriate level in the precise situation before us, where the President refrained from exercising his power to veto in the first instance. A veto allows Congress to respond, and the required veto message forces the President to articulate the constitutional objecitons for public consideration. As I will discuss in a moment, the veto message has other attractive characteristics.

It may be said, however, that without a line item veto, a President may be effectively forced to relinquish his or her constitutional objections to a portion of a package of which the President approves on the whole. I confess that I am not terribly sympathetic to this argument. If the President's constitutional qualms are serious enough, the package should be vetoed; if they are not so serious as to lead to a veto, I doubt that the President has a strong claim to remain last in line. But in any event the President is not deprived of resources for the future by the present enactment of a statute to which he or she objects on constitutional grounds. The President remains free to seek repeal of the objectionable provision, either by a specific proposal or as part of a package that Congress will find attractive. (This counter would be unavailable if the objectionable provision somehow would produce a constant decline in the President's power. I am hard-pressed to imagine such a provision, and the ones at issue today do not remotely fit that characterization.)

The President's continuing ability to seek repeal of objectionable legislation answers another objection to treating

the veto as the last point at which the President may assert a competing authority to interpret the Constitution. This objection--again not applicable to the present issue--is that today's president may object to legislation of which yesterday's President approved. Treating the veto as the last point does not disable the later President from seeking to persuade a later Congress that the earlier enactment was unconstitutional. It simply shifts the burden of securing remedial legislation; instead of Congress trying to persuade the President that the provision is an appropriate part of our law, the President must try to persuade Congress that it is not appropriate.

The second set of reasons that the theory of competing authorities is helpful goes deeper. The prospect of competing authorities with no final arbiter can be welcomed rather than feared, if the process of competition is healthy. Perhaps the best metaphor is that of a responsible dialogue. Many provisions of the Constitution suggest that a responsible dialogue, even with a model of competing authorities, is desirable. For present purposes the most relevant provision is the requirement that when the President vetoes a bill, his or her objections be transmitted to Congress. Analogously, the President may refuse to defend the constitutionality of a statute when it is challenged in court, offering the reasons for that refusal to the court, Congress, and the public.

In contrast, refusing to comply with enacted legislation appears to thwart rather than promote a responsible dialogue. There are no regular mechanisms by which Congress may respond to

the President. To be sure, Congress may conduct hearings like this one, hold administration nominees or proposals hostage, refuse to appropriate money for the President's programs, and the like. That is, Congress can force a dialogue to occur. Surely it is better, though, to structure the process of constitutional discussion in a less awkward and confrontational way. The veto provision seems admirably suited to the task. Allowing the President to refuse to enforce legislation does not.

To summarize briefly: Even if the President and Congress have authority independent of each other, and of the courts, to interpret the Constitution, their competing authorities must be exercised through a process that promotes responsible discussion of the constitutional issues. The best process available is the ordinary process of approval by Congress followed by the President's signature or veto. Indeed, I find it difficult to think of good reasons why the President should be allowed simply to disregard duly enacted legislation.

Thank you again for providing me with the opportunity to discuss these issues with you. I am happy to answer any questions you may have.